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No. 88-124

In The

Supreme Court of the United States

October Term, 1988

LYNN L. BREININGER,

Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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STATEMENT OF THE CASE

Petitioner herewith incorporates the Statement of the Case contained in his original Brief on the Merits at pages 4-11 and will at this time not set forth any additional Statement of the Case.

REPLY ARGUMENT

I. THE DUTY OF FAIR REPRESENTATION ISSUE

In its brief on the merits, the respondent Sheet Metal Workers International Association, Local Union No. 6, hereinafter (respondent Union) has devoted the initial portion of its argument at pp. 7-26 to an issue that is totally irrelevant to the questions before the Court. The unrelated issue sought to be interjected by the respondent Union is whether Section 8(b)(2) of the NLRA prohibits misconduct in the operation of a referral system other than discrimination based on membership in a union.

In Count I of his First Amended Complaint, Petitioner Breininger alleged that the respondent Union had breached its duty of fair representation by acting "arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause" in denying Petitioner job referrals. It is clear that in order for Petitioner to recover on his duty of fair representation claim, he need only establish that the union's activity violated its duty of fair representation. The duty of fair representation is a judicially-recognized duty emanating from the union's status as the exclusive bargaining representative. *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 171 L.Ed.2d 842 (1967). Petitioner submits that it is irrelevant whether the respondent

Union's actions in this case also violated the specific terms of Section 8(b)(2) of the NLRA.

In his original brief on the Merits, petitioner Breininger contended in his Argument that a union member's claim that his union breached its duty of fair representation by engaging in discriminatory job referrals may be brought in Federal District Court in an action invoking the Court's jurisdiction under 28 U.S.C. Section 1337 based on allegations of the breach of duty of fair representation. Petitioner Breininger did not claim that he was entitled to recover relief in Federal District Court solely of an unfair labor practice. If the latter were the case, such a claim would be pre-empted by the exclusive jurisdiction of the NLRA, subject to judicial review. The precise issue raised by Petitioner in his Brief on the Merits at p. 13 *et seq.* arises from the fact that some conduct can be both an unfair labor practice *and* a breach of the duty of fair representation. That fact raises the issue of whether courts are precluded from determining whether a union has breached its duty of fair representation on the theory that the NLRB has primary jurisdiction to determine the legality of the conduct involved.

It is respectfully submitted that the validity of the NLRB's interpretation of Section 8(b)(2) of the NLRA is irrelevant to the outcome of this case. Petitioner's First Claim for Relief is based on an alleged breach of the duty of fair representation. In the within case, the respondent Union's alleged misconduct is also "arguably subject to" the NLRA, so that the claim would be pre-empted unless it is within an exception to the pre-emption rule contained in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). It is unnecessary for the Court to resolve

the issue of whether or not the alleged Union misconduct violates a specific section of the NLRA. See *Vaca v. Sipes*, 386 U.S. 171 at 186 (1967). Rather, the key question presented is whether Federal Courts retain their authority to award relief for a breach of the duty of fair representation even though the NLRB might also view the same conduct as a violation of the NLRA. It is respectfully submitted that the Federal Courts do retain their authority in such instances. See generally the argument presented in the Brief of Petitioner on the Merits at pp. 16-20.

In its brief on the merits, the respondent Union has, in further addressing the Duty of Fair Representation issue at pp. 26-41, contended that the availability of an action for a breach of the duty of fair representation should be decided by this Court by reference to recent cases that have considered whether to recognize implied causes of action for violation of other federal statutes. This argument would if accepted, require the Court to overrule well settled labor law principles that have been recently reaffirmed. The respondent Union urges that this Court's previous basis for recognizing the doctrine of fair representation is no longer available. The respondent Union cites various authorities which, it contends, leads to the conclusion that the duty of fair representation cannot extend beyond requiring the Union not to commit an unfair labor practice as defined in the NLRA. The Union also seems to reason by analogy that a union member's redress for the narrowed duty of fair representation is limited to the administrative remedies provided by the NLRA.

The respondent Union's rationale fails to take issue with this Court's most recent reaffirmation, this very

term, of its adherence to the reasoning of *Vaca v. Sipes*, while declining, under the authorities on which the Union relies, to recognize an analogous cause of action for federal employees under Title VII of the Civil Service Reform Act of 1978. See *Karahalios v. National Federation of Federal Employees Local 1263*, 109 S.Ct. 1282 (1989). In *Karahalios*, this Court explained how, consistent with its decision in that case, it could continue to recognize a judicial remedy for a breach of the duty of fair representation even after Congress had extended the Act to labor unions and the board had held that a breach of duty was an unfair labor practice as follows at 109 S.Ct. at 1287:

> To be sure, prior to *Vaca*, the NLRB had construed Sections 7 and 8(b) of the NLRA to impose a duty of fair representation on union bargaining agents and to make its breach an unfair labor practice. *** The issue in *Vaca*, some years later, was whether, in light of *Miranda Fuel Co.*, the courts still had jurisdiction to enforce the unions' duty. As we understood our inquiry, it was whether Congress, in enacting Section 8(b) in 1947 had intended to oust the courts of their role enforcing the duty of fair representation implied under the NLRA. We held that the "tardy assumption" of jurisdiction by the NLRB was insufficient reason to abandon our prior cases, such as *Syres*.

It appears that the Court views *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 655 S.Ct. 226, 89 L.Ed. 173 (1944), *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed.2d 842 (1967) and other cases in that line of authority to be consistent with *Karahalios* and the decisions on which *Karahalios* relied. Note also that in *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 655 S.Ct. 226, 89 L.Ed.2d 173 (1944), this Court noted that if the NLRA confers powers on the bargaining representative of

a craft on class of employees without any commensurate duty, constitutional questions arise. Moreover, there exists a continuing question whether the NLRB's jurisdiction extends to the full scope of the duty of fair representation. Therefore, it is submitted that the reasoning in *Karahalios, supra*, provides no basis for the overruling of *Vaca v. Sipes, supra*, and the cases on which it relied.

The respondent Union further contends that the duty of fair representation should be restricted to the negotiation of collective bargaining agreements and to the administration of grievances and not "extended" to the administration of job referral systems. However, just last term, this Court described the scope of the doctrine of fair representation in very broad terms. In *Communications Workers of America v. Beck*, 108 S.Ct. 2641, 2645, 2647 (1988), this Court stated (citations omitted):

> This broad authority [to act as an exclusive bargaining agent], however, is tempered by the union's "statutory obligation to serve the interests of all members without hostility or discrimination toward any," *** a duty that extends not only to the negotiation of the collective bargaining agreement itself but also to the subsequent enforcement of that agreement, including the administration of any grievance procedure the agreement may establish.
>
> ******
>
> Federal courts may resolve unfair labor practice questions that "emerge as collateral issues in suits brought under independent federal remedies," *** and one such remedy over which federal jurisdiction is well settled is the judicially implied duty of fair representation. *** This jurisdiction to adjudicate fair representation claims encompasses challenges leveled not only at a union's contract administration

> and enforcement efforts, * * * but at its negotiation activities as well.

It is respectfully submitted that the respondent Union's argument would require the Court to retreat not just from early decisions . . . like *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944) and *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955) which were decided prior to the Court's recent cases on implied rights of action, but also decisions from the last couple of terms, like *Communications Workers of America v. Beck*, 108 S. Ct. 261 (1988).

The suggestion made by the respondent Union is that the Court's duty of fair representation cases involved only the negotiation of contracts or the processing of grievances. *Beck* involved the issue of whether expenditures of dues collected from members of the unit for activities unrelated to collective bargaining, contract administration, or grievance adjustment violated the union's duty of fair representation on the objecting employees' First Amendment rights. *Communications Workers of America v. Beck, supra*, 108 S. Ct. at 2645. Nor is the rationale for the duty of fair representation limited to contract negotiation or grievance processing. In *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976), this Court stated:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interest of all employees in a bargaining unit," . . . the controlling statutes have long been interpreted as imposing upon the bargaining agent *a responsibility equal in scope to*

> *its authority*, "the responsibility and duty of fair representation."

Any attempt to limit the applicability of the duty of fair representation to fact situations involved in previous Supreme Court cases would be arbitrary and unfounded. Nor is the attempt of the respondent Union to limit the doctrine of fair representation to "hybrid" fair representation claims sound. See *Amalgamated Association of Street and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971). See also Brief of Petitioners on the Merits at pp. 22-23.

II. THE LMRDA ISSUE

In its brief, the respondent Union has chosen to ignore the primary basis of the ruling of the United States Court of Appeals for the Sixth Circuit that petitioner's LMRDA claims were pre-empted by the NLRB's exclusive jurisdiction over discriminatory job referrals. (See Appendix A, page A-2 of Appendix to Petition for Writ of Certiorari). In his Brief on the Merits at pp. 24-25, petitioner Breininger set forth his contention that the Sixth Circuit's pre-emption analysis with respect to Petitioner's claim brought pursuant to 29 U.S.C. Sections 411(a)(5), 412, and 529 (Labor Management Reporting and Disclosure Act). Petitioner's contentions in this regard have gone unanswered by the respondent Union.

The respondent Union has chosen to focus its argument on a contention that Count II of Petitioner's First Amended Complaint fails to state a claim on the merits. However, on the merits of petitioner's LMRDA claim, the Sixth Circuit's only holding was that petitioner's claim

was foreclosed by *Finnegan v. Leu*, 456 U.S. 431 (1982). It is respectfully submitted that in noting that petitioner's claim was foreclosed by *Finnegan v. Leu*, the Sixth Circuit went beyond the holding of the District Court, which merely held that petitioner's LMRDA claims were preempted by the NLRB's exclusive jurisdiction over discriminatory job referrals. Moreover, the Sixth Circuit's view of the Court's decision in *Finnegan v. Leu* was incorrect. Petitioner's LMRDA claim should not be dismissed on some other ground at this stage of the litigation since the lower courts have not made specific findings on what exactly the Union and/or its leadership did to petitioner and why. It is respectfully submitted that petitioner's First Amended Complaint adequately states a claim of "discipline" within the meaning of the LMRDA.

In its brief, the respondent Union contends that the term "discipline" for purposes of 29 U.S.C. Section 529 refers only to those actions for which procedural due process is required under 29 U.S.C. Section 411(a)(5). Even if the scope of the two sections is parallel, assuming *arguendo*, the respondent Union in its brief at page 46 urges an overly narrow interpretation of the term "discipline" when it urges that a union member is subject to discipline only when "the substantive rule being enforced is valid, but procedural protections are required." However, 29 U.S.C. Section 529 by its clear language prohibits imposing of discipline by any labor organization, or any officer, agent, shop steward, or other representative of a labor organization in retaliation for the exercise of a protected right. Legislative history, as set forth in the Brief of the Association for Union Democracy, Teamsters for a Democratic Union, and Public Citizen as Amici

Curiae at pp. 7-10 suggests an overriding concern with abuses by union leaders of powers they can exercise against union members. Given the legislative history, it is doubtful that Congress would have meant to deny a remedy for punishment meted out by means of a union leader's abuse of his position simply because he chose not to invoke formal union processes. Petitioner's First Amended Complaint refers to retaliation by the Union's leadership against petitioner by discriminating against him in the administration of a job referral system recognized in a contract between the Union and employers. The leadership had control over the system only by virtue of its position with the union. It is respectfully submitted that such an abuse of power is that which Congress intended to proscribe.

III. CONCLUSION

Petitioner Breininger respectfully requests that this Court reverse the Sixth Circuit's decision filed March 1, 1988, in all regards and remand this cause for further proceedings on the merits to the United States District Court for the Northern District of Ohio, Western Division.

Respectfully submitted,

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